

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS
OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

IN THE MATTER OF:

Zi Wu Zhang and Luk Ying Ko

Petitioner

Luk Ying Ko

For the Petitioner

(Christina Adams, Translator)

Wright A. Jolly, Jr.

Department of Housing and

Community Affairs

*

*

*

*

*

*

*

*

*

*

*

*

*

Board of Appeals No. S-2760
(OZAH No. 10-10)

Before: Lynn A. Robeson, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

TABLE OF CONTENTS

I. STATEMENT OF THE CASE.....	2
II. FACTUAL BACKGROUND	3
A. THE SUBJECT PROPERTY AND ITS CURRENT USE	3
B. THE SURROUNDING NEIGHBORHOOD	5
C. PROPOSED USE	6
D. THE MASTER PLAN	10
E. NEIGHBORHOOD RESPONSE	10
F. TRAFFIC IMPACTS	10
F. ENVIRONMENTAL IMPACTS	11
III. SUMMARY OF THE HEARING	11
A. PETITIONER'S CASE.....	11
B. PUBLIC AGENCY'S CASE	11
IV. FINDINGS AND CONCLUSIONS	12
A. STANDARD FOR EVALUATION	12
B. GENERAL STANDARDS.....	14
C. SPECIFIC STANDARDS	19
D. ADDITIONAL APPLICABLE STANDARDS	23

V. RECOMMENDATION	24
-------------------------	----

I. STATEMENT OF THE CASE

In Petition No. S-2760, Zi Wu Zhang and Luk Ying Ko, seek approval of a Special Exception under Zoning Ordinance §59-G-2.00 to allow an accessory apartment on property located at 12509 Stratford Garden Drive, Silver Spring, Maryland. The property is zoned R-90. The legal description of the property is Lot 27, Block A, in the Manors of Paint Branch Subdivision, and is shown on Tax Map No. KQ23.

The Board issued a notice of a public hearing before the Hearing Examiner for February 11, 2010. Exhibit 11(b). The Board issued a second notice advising that the hearing was rescheduled until October 28, 2010. Exhibit 14.

Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC), in its report dated February 3, 2010 (Exhibit 13), recommended approval of the Petition, with four (4) conditions.¹ Pursuant to Section 59-A-4.128 of the Code, the Planning Board did not review this special exception. Exhibit 13, p. 2.

The Department of Housing and Community Affairs (“DHCA”) inspected the property on January 21, 2010, and issued a memorandum describing its findings on February 1, 2010. Housing Code Inspector Wright A. Jolly, Jr., found that several items had to be corrected prior to occupancy. Exhibit 12. The hearing went forward as scheduled on October 28, 2010.

No opposition appeared at the hearing. At the public hearing, the Hearing Examiner requested a revised lighting plan and the record was held open until November 30, 2010, to permit the Petitioner to file the revised plan and install additional lighting. T 20, 37-3..

¹ The Technical Staff Report, Exhibit 13, is frequently quoted and paraphrased herein.

Subsequently, the Applicants submitted a revised lighting plan dated November 22, 2010. Mr. Jolly submitted additional photographs demonstrating that the lighting had been installed. The record closed on November 30, 2010.

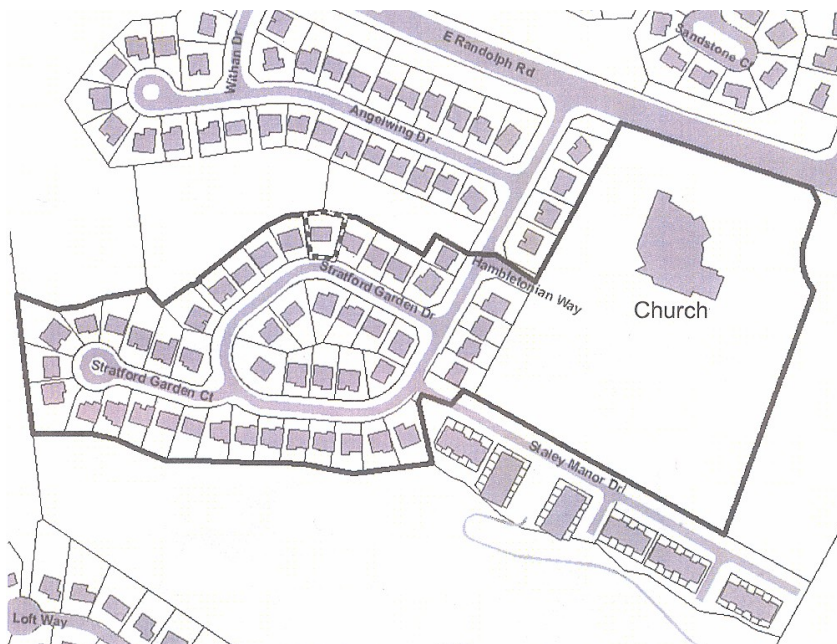
For the reasons set forth below, the Hearing Examiner recommends approval of the Special Exception petition, subject to the conditions set forth in Section V. of this report.

II. FACTUAL BACKGROUND

A. The Subject Property and its Current Use

Located at 12509 Stratford Garden Drive, Silver Spring, Maryland, the subject property is south of intersection of East Randolph Road and Stratford Garden Drive (west of Route 29), as shown on “Neighborhood Boundary” map in the Technical Staff Report is shown below:

**NEIGHBORHOOD BOUNDARY
TECHNICAL STAFF REPORT, EX. 13**



The property forms a rectangle consisting of 7,768 square feet of land improved with a 2,194 square foot single-family dwelling. Exhibit 13, p. 3. The lot slopes gently away from the road to a large, open back yard. A curb cut and driveway provide access from Stratford Garden Drive, along which the property has approximately 57 feet of street frontage. Exhibit 13, p. 3. Available parking includes a two-car garage, additional room on the driveway and on-street parking. An aerial view depicting the subject property is shown below:

**AERIAL VIEW OF ADJOINING AND
CONFRONTING PROPERTIES, TECHNICAL
STAFF REPORT. EXHIBIT 13.**



Technical Staff reports that the existing landscaping is well-maintained. A view of the dwelling from Stratford Garden Drive is shown on the next page.

**VIEW OF FRONT OF HOUSE, TECHNICAL
STAFF REPORT, EXHIBIT 13**



B. The Surrounding Neighborhood

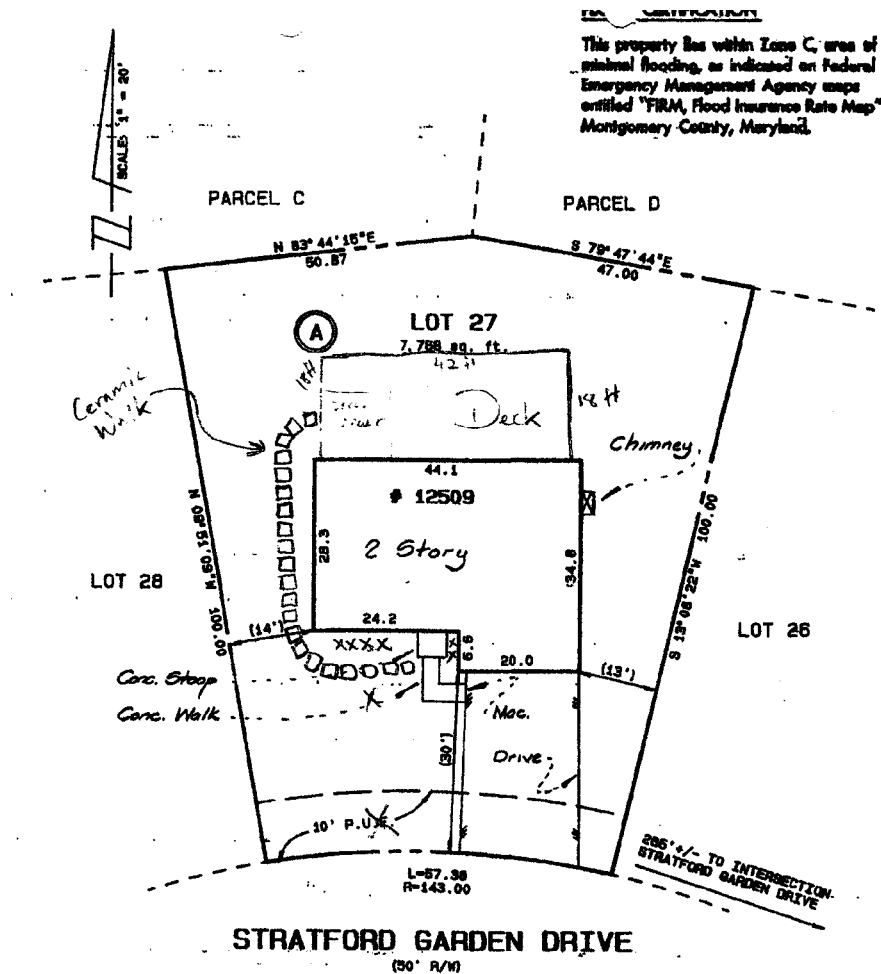
Technical Staff defined the “neighborhood” as generally bounded by Stratford Garden Drive to the north, the Southern Asian Seventh Day Adventist Church to the east, and Stratford Garden Court to the south and west (shown on page 3 of this Report). Technical Staff reasoned that this delineation included any nearby properties that may be affected by the potential increase in density or traffic. Exhibit 13, p. 4. The church is included because of the possibility that residents living in the accessory apartment will attend church there. The entire area is zoned R-90/TDR and no other special exceptions or Registered Living Units (RLUs) exist within the neighborhood. Exhibit 13, p. 4.

C. Proposed Use

The applicant proposes to rent a 596-square foot accessory apartment of which 351.02 is habitable space. Exhibits 12 and 13. A stone sidewalk permits access to the basement apartment in the rear of the dwelling underneath a wooden deck (shown below).

LANDSCAPE AND LIGHTING PLAN

EXHIBIT 5



X = TRUE

$\boxed{1} = \text{Walk}$

xxx : bue! c.

= TREE
] = Walk
x = bush etc.
and
Landscape and Lighting Plan
EXHIBIT NO. 5

EXHIBIT NO.

5.

Technical Staff advises that the basement entrance appears to be that of a single-family home and should not detract from the neighborhood. Exhibit 13, p. 6. A 60-watt light located just above the door illuminates the entrance. Technical Staff recommended that additional lighting be installed along the side of the house to light the stone path. Exhibit 13, p. 6.

**VIEW OF BASEMENT ENTRANCE,
TECHNICAL STAFF REPORT, EXHIBIT 13**



The floor plan (on the next page) submitted by the Applicant depicts a bedroom, living area/bedroom, a kitchen, “utility area” and bathroom.

FLOOR PLAN, EXHIBIT 6

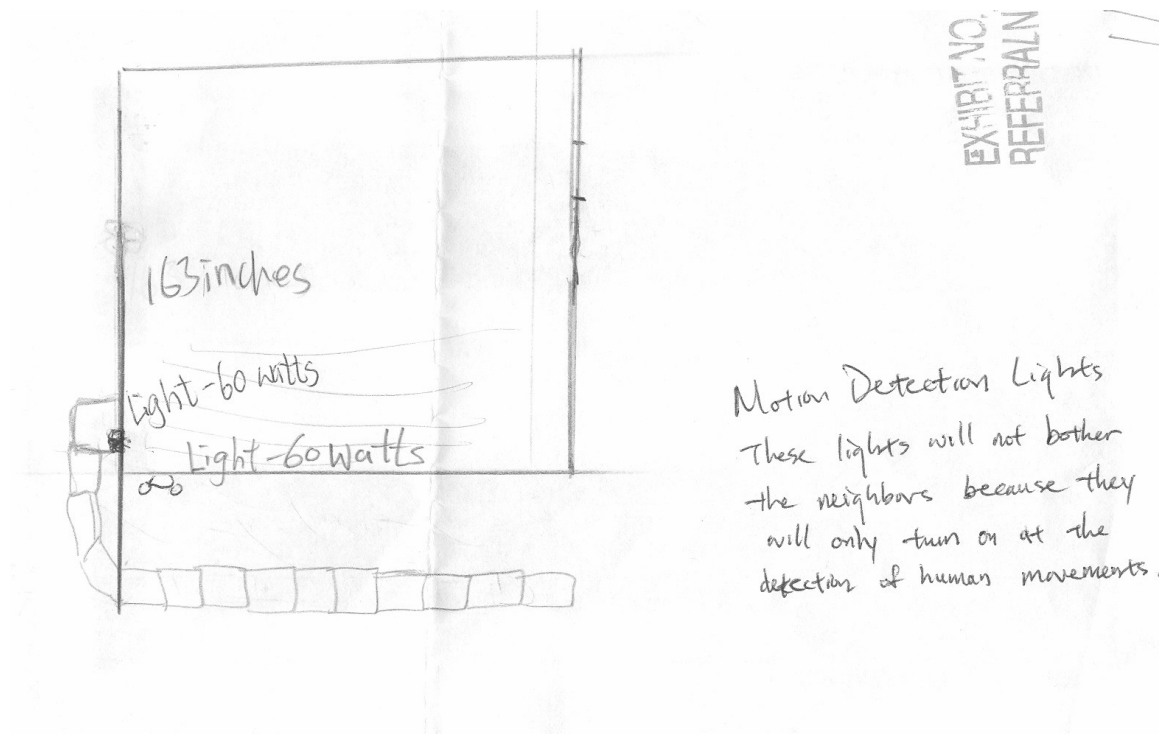


A representative of DHCA, Housing Inspector Wright A. Jolly, Jr., inspected the property on January 21, 2010. Mr. Jolly reported his findings in a memorandum dated February 1, 2010 (Exhibit 12). They are as follows:

1. Solid Waste: Remove the wood, trash bags, plastic fencing, cement splash block and rubbish from the property.
2. Trash Cans: Provide enough trash cans for the disposal of solid waste and obtain lids for the trash cans that do not have lids on them.
3. Kitchen Stove: Replace/repair the front right burner which is inoperable.
4. Off Street Parking: There are two driveway and two garage parking spaces available.
5. Habitable Space: Based on the square footage of the bedroom (169.02 sq. ft.) and total habitable space: 351.03 sq. ft., there can be no more than three occupants living in the accessory apartment.
6. Storage Room: The room can not be used as a sleeping area. It does not meet the minimum door or window egress requirements.

Exhibit 12.

The applicant testified that they would take the steps required to make the accessory apartment habitable (T. 26-28). At the request of the Hearing Examiner, the Applicants did submit a revised lighting plan to address Technical Staff's recommendation that there be additional illumination of the stone walkway leading to the rear entrance (Exhibit 21, shown below):



The additional lighting fixture would be placed to the rear along the pathway and consist of a 60-watt motion sensor light. After submission of the revised lighting plan, Mr. Jolly submitted photographs showing that the light on the side had been installed at the location shown. Exhibit 22.

D. The Master Plan

The subject property lies within the Rolling Acres area of the 1997 Fairland Master Plan. Exhibit 13, p. 7, Attachment 2. Technical Staff advises that the Sector Plan contains no site specific recommendations relevant to this particular property. Exhibit 13. As one goal, the Master Plan seeks to “encourage and maintain a wide choice housing types and neighborhoods for people of all income, ages, lifestyles and physical capabilities at appropriate densities and locations.” *1997 Fairland Master Plan*, p. 18, Exhibit 9. Because this accessory apartment fulfills that goal, Technical Staff found the proposed use consistent with the Master Plan. Exhibit 13, p. 7, Attachment 2.

E. Neighborhood Response

There has been no response from the community, either positive or negative, regarding this accessory apartment application. There is no opposition in this case.

F. Traffic Impacts

Technical Staff advises that the requested special exception meets the transportation related requirements of the Adequate Public Facilities (APF) review. Exhibit 13, p. 7. The existing single-family dwelling will generate one peak-hour trip during the weekday morning and evening peak-periods. Exhibit 13, p. 7. The accessory apartment is estimated to generate a single additional trip. Because these combined uses generate under 30 peak hour trips, Policy Area Mobility Review (PAMR) is not required. Similarly, due to the small scale of the proposed use, Technical Staff reports that LATR is also not required.

Technical Staff and DHCA also report that on-site parking is adequate. Parking

for both the single-family dwelling and the accessory apartment may be accommodated by the two-car attached garage, space in the driveway and on-street parking. Exhibits 12, 13. Off-street parking (the garage and driveway) may house four cars. Exhibit 12.

F. Environmental Impacts

Petitioner does not propose any external changes to the site. Technical Staff advises that the property is exempt from the Forest Conservation Law and that there are no “champion trees” on the property. Exhibit 13, p. 24.

III. SUMMARY OF THE HEARING

Petitioner testified at the public hearing in support of the petition. Mr. Wright A. Jolly, Jr., a DHCA inspector, also testified as to compliance with the Housing Code.

A. Petitioner’s Case

Ms. Luk Ying:

Ms. Luk testified on behalf of both Applicants. Ms. Luk authenticated the evidence in the record and incorporated the findings and conclusions of the Technical Staff Report into her testimony. T.11-21. She agreed to abide with the conditions contained therein as well as those in Mr. Jolly’s memorandum (Exhibit 12). T. 23-24. She also agreed to include install additional lighting along the pathway. T.11-26. Ms. Luk testified that many of the violations found by the Housing Inspector were caused by a previous tenant. T. 26. She agreed to leave the record open until November 30, 2010, to give her time to submit a revised lighting plan and install a motion sensor light. T. 37-38.

B. Public Agency’s Case

Housing Code Inspector Wright Jolly:

Mr. Wright Jolly testified that his Memorandum dated February 1, 2010, described his

findings regarding the special exception request. T. 16. The total habitable area of the apartment consisted of 351 square feet. He shared with Ms. Ko a copy of Exhibit 19 showing the pathway that needed to be illuminated. T. 24. He stated that Ms. Ko would have to obtain a permit to install the additional lighting on the property. T. 30. Finally, he testified that Ms. Ko had been very cooperative in permitting access to the property. T. 27.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards and conditions are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioner will have satisfied all the requirements to obtain the special exception, if she complies with the recommended conditions. Exhibit 13.

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Code 59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioner complies with the recommended conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code Section 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. Inherent adverse effects are “the physical and

operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code, Section 59-G-1.21. Inherent adverse effects alone are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with an accessory apartment. Characteristics of the proposed accessory apartment that are consistent with the “necessarily associated” characteristics of accessory apartments will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with accessory apartments, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff lists the following inherent characteristics of accessory apartments (Exhibit 12, p. 9):

- (1) The existence of the apartment as a separate entity from the main living unit;
- (2) The provision within the apartment of the necessary facilities and floor area to qualify as a habitable space under the applicable Code provisions;
- (3) The provision of a separate entrance and walkway;

- (4) The provision of sufficient parking and lighting; and
- (5) The added activity from an additional household, including potential for additional noise from that additional household, and more noise.

The Hearing Examiner concludes that, in general, an accessory apartment has characteristics similar to a single-family residence, with only a modest increase in traffic, parking and noise that would be consistent with a larger family occupying a single-family residence. Thus, the inherent effects of an accessory apartment would include the fact that an additional resident (or residents) will be added to the neighborhood, with the concomitant possibility of an additional vehicle or two.

Technical Staff found “there are no adverse effects that will negatively impact the community above and beyond those necessarily inherent to an accessory apartment.” Exhibit 13, p. 9. Thus, Staff concluded that there are no non-inherent adverse effects arising from the accessory apartment sufficient to form a basis for denial.

As the accessory apartment is fully contained within the interior of the single-family home, will generate only one additional trip, contains a separate walkway and entrance illuminated with lighting characteristic of residential homes, and has adequate off-street and on-street parking, the Hearing Examiner concludes that there are no non-inherent adverse effects of the requested use and there will be no adverse effects sufficient to warrant denial of the petition.

B. General Standards

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report and the Petitioner’s written evidence and testimony provide sufficient evidence that the general standards would be satisfied in this case, as outlined below.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(a) -*A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) Is a permissible special exception in the zone.

Conclusion: An accessory apartment is a permissible special exception in the R-90/TDR

Zone, pursuant to Code § 59-C-1.31.

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: Technical Staff reports that the proposed use complies with the specific standards set forth in § 59-G-2.00 for an accessory apartment, as outlined in Part IV.C, below.

(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: The subject property lies within the 1997 *Master Plan*. The Plan does not contain any site-specific references to the subject property, but does contain a general goal of encouraging and supporting different housing types. Exhibit 9, p. 18. Technical Staff concluded that this application meets that goal, as does the Hearing Examiner.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses. The Board or Hearing Examiner must consider whether the public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.*

Conclusion: The accessory apartment will be located entirely within an existing dwelling and will not require any external changes. The improvements on the property will therefore maintain its residential character. There will be sufficient parking, considering the garage and driveway space and the availability of on-street parking, and traffic conditions will not be affected adversely, according to Transportation Planning Staff. There are no other operating accessory apartments and only one Registered Living Unit in the neighborhood. Based on these facts, and the small scale of the use, the addition of this use will not affect the area adversely. Based on these facts and the other evidence of record, the Hearing Examiner concludes, as did Technical Staff, that the proposed use will be in harmony with the general character of the neighborhood. Technical Staff indicates that the subject site will be adequately served by existing public facilities (Exhibit 13, p. 7), and the evidence supports this conclusion.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: For the reasons set forth in answer to the previous section of this report, the special exception will not be detrimental to the use, peaceful enjoyment, economic value, or development of the surrounding properties or the defined neighborhood, provided that the special exception is operated in compliance with the listed conditions of approval.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The lighting for the accessory apartment use consists of two 60-watt motion sensor lights at the side and rear entrance of the apartment. Exhibit 21. Both are characteristic of residential lighting for a single-family home. Since the use will be primarily indoors and residential, it will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site. The Hearing Examiner so finds.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: As discussed above, there are no accessory apartments and only one Registered Living Unit within the neighborhood. Technical Staff concluded, and the Hearing Examiner finds, that the proposed special exception will not increase the number, scope, or intensity of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: Technical Staff indicates that the subject site will be adequately served by existing public facilities (Exhibit 12), and the evidence supports this conclusion.

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*
- (B) *If the special exception does not require approval of a preliminary plan of subdivision, the Board of Appeals must determine the adequacy of public facilities when it considers the special exception application. The Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision. Therefore, the Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the applicable Growth Policy standards. These standards include Local Area Transportation Review (LATR) and Policy Area Mobility Review (PAMR). As indicated in Part II.F. of this Report, Transportation Planning Staff did do such a review, and concluded that the proposed accessory apartment use would add one additional trip during each of the peak-hour weekday periods. Exhibit 13, Page 14. Since the existing house combined with the proposed accessory apartment would generate fewer than 30 total trips in the weekday morning and evening peak hours, the requirements of the LATR are satisfied without a traffic study.

Since the proposed use is estimated to generate only one additional peak-hour trip, PAMR is also satisfied. Therefore, the Transportation Staff concluded, as does the Hearing Examiner, that the instant petition meets all the applicable Growth Policy standards.

- (C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: Based on the evidence of record, especially as to the availability of off- and on-street parking, the Hearing Examiner so finds. Exhibit 12, Exhibit 13.

C. Specific Standards

The testimony and the exhibits of record, especially the Technical Staff Report (Exhibit 12), provide sufficient evidence that the specific standards required by Section 59-G-2.00 are satisfied in this case, as described below.

Sec. 59-G-2.00. Accessory apartment.

A special exception may be granted for an accessory apartment on the same lot as an existing one-family detached dwelling, subject to the following standards and requirements:

(a) Dwelling unit requirements:

- (1) Only one accessory apartment may be created on the same lot as an existing one-family detached dwelling.*

Conclusion: Only one accessory apartment is proposed.

- (2) The accessory apartment must have at least one party wall in common with the main dwelling on a lot of one acre (43,560 square feet) or less. On a lot of more than one acre, an accessory apartment may be added to an existing one-family detached dwelling, or may be created through conversion of a separate accessory structure already existing on the same lot as the main dwelling on December 2, 1983. An accessory apartment may be permitted in a*

separate accessory structure built after December 2, 1983, provided:

- (i) The lot is 2 acres or more in size; and*
- (ii) The apartment will house a care-giver found by the Board to be needed to provide assistance to an elderly, ill or handicapped relative of the owner-occupant.*

Conclusion: The apartment is located in the basement of an existing house, and therefore shares a wall in common, as required for a lot of this size (under an acre).

- (3) An addition or extension to a main dwelling may be approved in order to add additional floor space to accommodate an accessory apartment. All development standards of the zone apply. An addition to an accessory structure is not permitted.*

Conclusion: No new addition or extension of the main dwelling is proposed. The accessory apartment will be located in an existing dwelling.

- (4) The one-family detached dwelling in which the accessory apartment is to be created or to which it is to be added must be at least 5 years old on the date of application for special exception.*

Conclusion: The house was built in 1995. Exhibit 13, p. 3. It therefore meets the “5 year old” requirement.

- (5) The accessory apartment must not be located on a lot:*
 - (i) That is occupied by a family of unrelated persons; or*
 - (ii) Where any of the following otherwise allowed residential uses exist: guest room for rent, boardinghouse or a registered living unit; or*
 - (iii) That contains any rental residential use other than an accessory dwelling in an agricultural zone.*

Conclusion: The use as proposed does not violate any of the provisions of this subsection.

(6) Any separate entrance must be located so that the appearance of a single-family dwelling is preserved.

Conclusion: Access to the accessory apartment is through a basement in the rear of the structure, on the lower level. There will thus be no change to the residential appearance of the dwelling.

(6) All external modifications and improvements must be compatible with the existing dwelling and surrounding properties.

Conclusion: Petitioners are not proposing any new construction or modifications to the exterior of the dwelling with the exception of an additional motion sensor light on the side wall facing the stone path, which does not affect the residential nature of the structure.

(7) The accessory apartment must have the same street address (house number) as the main dwelling.

Conclusion: The accessory apartment will have the same address as the main dwelling.

(8) The accessory apartment must be subordinate to the main dwelling. The floor area of the accessory apartment is limited to a maximum of 1,200 square feet.

Conclusion: The accessory apartment is subordinate to the main dwelling and under 1,200 square feet, as it occupies approximately 596 square feet of space (351.02 square feet of which is habitable space) in Petitioner's 2,194 square-foot home. Exhibit 13, pp. 3-6; Exhibit 12.

59-G § 2.00(b) Ownership Requirements

(1) The owner of the lot on which the accessory apartment is located must occupy one of the dwelling units, except for bona fide temporary absences not exceeding 6 months in any 12-month period. The period of temporary absence may be increased by the Board upon a finding that a hardship would otherwise result.

Conclusion: The Petitioners will live in the upper level of the dwelling.

- (2) *Except in the case of an accessory apartment that exists at the time of the acquisition of the home by the Petitioner, one year must have elapsed between the date when the owner purchased the property (settlement date) and the date when the special exception becomes effective. The Board may waive this requirement upon a finding that a hardship would otherwise result.*

Conclusion: According to the SDAT records, Petitioner purchased the home in 1995.

Exhibit 1. Therefore, the one-year rule has therefore been satisfied.

- (3) *Under no circumstances, is the owner allowed to receive compensation for the occupancy of more than one dwelling unit.*

Conclusion: The Petitioners will receive compensation for only one dwelling unit as a condition of the special exception.

- (4) *For purposes of this section owner means an individual who owns, or whose parent or child owns, a substantial equitable interest in the property as determined by the Board.*

Conclusion: While the best evidence supporting ownership is the deed itself, SDAT records are reasonably reliable and indicate that Petitioner is the owner of the property.

Exhibit 1. No evidence appearing to the contrary, the Hearing Examiner finds that this standard has been met.

- (5) *The restrictions under (1) and (3) above do not apply if the accessory apartment is occupied by an elderly person who has been a continuous tenant of the accessory apartment for at least 20 years.*

Conclusion: Not applicable.

59-G § 2.00(c) Land Use Requirements

- (1) *The minimum lot size must be 6,000 square feet, except where the minimum lot size of the zone is larger. A property consisting of more than one record lot, including a fraction of a lot, is to be treated as one lot if it contains a single one-family detached dwelling lawfully constructed prior to October, 1967. All other development standards of the zone must also apply, including setbacks, lot width, lot*

coverage, building height and the standards for an accessory building in the case of conversion of such a building.

Conclusion: The accessory apartment is located on a single lot that is approximately 7,768 square feet in size, and therefore satisfies this requirement.

(2) An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in excessive concentration of similar uses, including other special exception uses, in the general neighborhood of the proposed use(see also section G-1.21 (a)(7) which concerns excessive concentration of special exceptions in general).

Conclusion: As there are no operating accessory apartments and only one Registered Living Units in the neighborhood, the Hearing Examiner finds that the petition will not create an excessive concentration of similar uses. Exhibit 13.

(3) Adequate parking must be provided. There must be a minimum of 2 off-street parking spaces unless the Board makes either of the following findings:

- (i) More spaces are required to supplement on-street parking; or*
- (ii) Adequate on-street parking permits fewer off-street spaces.*
- (iii) Off-street parking spaces may be in a driveway but otherwise must not be located in the yard area between the front of the house and the street right-of-way line.*

Conclusion: Both Technical Staff and the Housing Inspector concluded that garage and driveway may accommodate four cars. Additional on-street parking is also available. The Hearing Examiner finds, therefore, that the minimum requirement of two (2) off-street spaces has been met. Exhibits 12 and 13.

D. Additional Applicable Standards

Not only must an accessory apartment comply with the zoning requirements as set forth in 59-G, it must also be approved for habitation by the DHCA. As discussed in Part II. D. of this Report, the Housing Code Inspector's report (Exhibit 12) notes certain issues, and

recommends that occupation of the accessory apartment be limited to no more than three family members or two unrelated persons. As mentioned above, Petitioners have agreed to meet all conditions, and will make the repairs required by the Housing Code Inspector.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2760, which seeks a special exception for an accessory apartment to be located at 12509 Stratford Garden Drive, Silver Spring, Maryland, be and hereby is, **GRANTED**, with the following conditions:

1. The Petitioner is bound by their testimony, representations and exhibits of record;
2. The Petitioner must make the repairs needed to comply with the conditions set forth in the Memorandum of Wright Jolly, Housing Code Inspector, Division of Housing and Community Affairs (Exhibit 12):
 1. Solid Waste: Remove the wood, trash bags, plastic fencing, cement splash block and rubbish from the property.
 2. Trash Cans: Provide enough trash cans for the disposal of solid waste and obtain lids for the trash cans that do not have lids on them.
 3. Kitchen Stove: Replace/repair the front right burner which is inoperable.
 4. Off Street Parking: There are two driveway and two garage parking spaces available.
3. Based on habitable space in the apartment (351.02 square feet), no more than three family members or two unrelated persons may reside in the accessory apartment.
4. The storage or “utility” room can not be used as a sleeping area.
5. Petitioner must occupy one of the dwelling units on the lot on which the accessory apartment is located.
6. Petitioner must not receive compensation for the occupancy of more than one dwelling unit.
7. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioners shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and

other governmental requirements.

Dated: December 20, 2010

Respectfully submitted,

Lynn A. Robeson
Hearing Examiner